proceedings by or against the Government of a State, on the State Secretary of such State."

For East Malaysia the "State Attorney-General" is substituted for "State Secretary of such State." The claim is clearly for the refund of royalty paid on timber. It is a claim against State revenue and as such the State Government is involved.

The plaintiffs contended that there was no irregularity in suing the Conservator of Forests as the money was paid as a result of a demand by him. Even if there is any irregularity the court has a discretion to allow the plaintiffs to amend the writ. It was submitted that the defendant had taken fresh step by writing two letters to the plaintiffs. The defendant entered conditional appearance on 21st October, 1969. The first letter written before the conditional appearance asked for names and addresses of those constituting the firm. The second letter written after the conditional appearance asked for various particulars. The defendant had agreed to give the plaintiffs two weeks to file the necessary particulars.

O.70, r.2 reads: —

"No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

On the other hand the defendant contended that the steps taken did not amount to "any fresh step". The filing of an affidavit in answer to interrogatories is not taking a fresh step: *Wood* v. *Middleton*[1]. Nor the filing of an affidavit in answer to those in support of a motion for receiver: *Zalinoff* v. *Hammond*[2]. But an application for security for costs is a fresh step: *The "Assunta"*[3]. In my view the defendant is right to say that the two letters do not amount to "any fresh step".

From the statement of claim it seems that the compensation of $24,888 was ordered to be paid by the court. The proper course would be to appeal against the order. It is wrong to get round the difficulty by coming to this court. But there is nothing to prevent the Government agreeing to the payment *ex-gratia* if it is considered that the royalty should not have been included in the compensation.

I consider that the defendant is entitled to succeed in this motion to have the writ of summons and service of the same set aside with costs to be taxed.

Order accordingly.

TUA KIN LING v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) February 4, 1970]

[Johore Bahru — Criminal Appeal No. 104 of 1968]

Evidence — Witness — Lying on one or two points — Whether whole evidence should be rejected — Duty of court.

Gaming — Assisting in carrying on a public lottery — Possession — Evidence of — Common Gaming Houses Ordinance, 1953, s. 4(1)(c).

The rule is that if a witness had lied on one or two points it does not necessarily follow that his whole evidence should be rejected. But it is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted.

In this case the appellant and another person were charged with an offence of assisting in carrying on a public lottery punishable under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. They claimed trial. At the end of the prosecution case the other person was acquitted and the appellant was called on to enter upon his defence. The learned magistrate accepted the evidence of a prosecution witness wholesale without rejecting the parts which had been shown to be inconsistent with the truth.

Held, allowing the appeal: the case for the prosecution as it stood in view of the conflicting testimony of the prosecution witness was no better than that against the acquitted man.

Cases referred to:-

(1) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237.

(2) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.

MAGISTRATE'S CRIMINAL APPEAL.

R. Ramason for the appellant.

Mohamed Nor bin Ahmad (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The appellant and another person were charged with an offence of assisting in carrying on a public lottery punishable under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953 (No. 26 of 1953).

They claimed trial. At the end of the prosecution case the other person was acquitted and the appellant was called on to enter upon his defence. At the conclusion of the hearing he was convicted and sentenced to pay a fine of $2,000 in default five months imprisonment.

The appeal is on many grounds mainly on questions of fact.

The prosecution case mainly relied on the evidence of the chief inspector, P.W.1. His evidence may be put briefly as follows: On 3rd April, 1968 at about 8.10 p.m. he led a police party to raid premises No. 1, Jalan Rogayah, Batu Pahat. Two officers entered the premises by the side door covering the ground floor, the first floor and the kitchen of the premises. P.W.1 himself with two other men went to the front portion of the premises which had a collapsible gate locked from inside. P.W.1 noticed a fat man seated beside a table. He was the appellant. P.W.1 identified himself and asked him to open the gates. But the appellant did not heed him. He collected pieces of paper in bundles from the drawer of the table and packed them in a paper bag, switched off the lights and disappeared in the dark. On seeing this P.W.1 went to the rear portion of the shop and warned his men at the rear to be on the lookout. P.W.1 went back to the front and got himself a piece of wood and forced open the collapsible gate. He entered the premises and flashed his torchlight and saw two male Chinese, the appellant and the other person coming from the rear of the shop. P.W.1

switched on the lights of the shop. One of the men at the rear (P.W.2) ran into the building and took P.W.1 to the rear portion of the premises. From the roof of the kitchen, a paper bag was recovered. In evidence P.W.1 said that it contained many pieces of paper.

P.W.1 then forced open the drawers of the table. From the right drawer he recovered a biscuit tin, P2, and from the left drawer he recovered a paper box, P3. The paper bag, biscuit tin and paper box contained among other things mostly booklets, note books and papers, most of which were shown by a police expert to be records of stake, account sheets and account books relating to character lottery.

P.W.1 said further that after the arrest of the two persons, he took them to the police station where he searched them and recovered two bunches of keys from each of them. At 12.45 a.m. he went back to the premises with the two persons. He tried the keys from one of the bunches he had recovered from the appellant. He found that two keys fitted the drawers of the table.

At the close of the prosecution in deciding that the appellant had a case to answer, the learned magistrate made the following finding "From the facts and evidence produced before me I find ample evidence had been adduced by the prosecution to connect the first accused (i.e. the appellant) with the possession of the exhibits. I am fully aware of the principle and meaning of possession enunciated by the leading case of *Chan Pean Leon* v. *Public Prosecutor*".[1] His finding of facts in the grounds of judgment is based solely on the story of P.W.1.

Now in that case the prosecution did show that the appellant was a partner in the business of the shop raided. In this case, however, the prosecution adduced no evidence to show the relationship of the appellant with the business of the shop. Therefore, the only evidence adduced by the prosecution to connect the appellant with the exhibits, P1 the paper bag, P2 the biscuit tin and P3 the paper box, was the story of P.W.1 that he had seen the appellant sitting at a table in the shop and that these exhibits were from the drawers of this table.

As regards the evidence leading to the recovery of P1, the paper bag, the evidence of the police officer, P.W.2 was at variance with that of P.W.1. P.W.2 said that on arrival at the premises he was instructed to go upstairs to see if anything had been thrown. After he had been upstairs for about a minute he heard a commotion at the front part of the premises and saw a bundle being thrown up from downstairs on to the zinc roof. The bundle was the paper bag. He gave no evidence that P.W.1 had rushed to the back and asked him to be on the lookout.

As regards P1, P.W.1 said that he had seen the appellant collecting papers from the drawer of the table, putting them in a paper bag similar to P1, that later P1 was collected from the zinc roof of the kitchen where P.W.2 had seen P1 being thrown upwards. From this piece of evidence certain implications had to be considered.

Consideration should have been given whether it was possible for anything to be thrown on the roof from inside the premises, whether or not the point was challenged by the defence. The prosecution adduced no evidence one way or the other. The learned magistrate only dealt with this point during the defence when the defence led evidence that it was not possible as all airwells had been sealed from inside the ground floor. After visiting the scene while hearing the defence, the learned magistrate found that there was "every possibility for anyone to throw anything similar to Exhibit P1 from the direction of the last door at the back lane of the premises upward to the zinc roof."

The learned magistrate was wrong in two respects (1) by putting the onus of proof on this point to the defence; and (2) by not making a definite finding on a question of fact in that he did not say whether it was possible to throw it upwards on to the zinc roof from *inside* or *outside* the premises.

It should also have been considered whether P.W.1 was telling the truth when he said he had seen the appellant collecting papers from the drawer in view of his subsequent testimony. The veracity of this witness was challenged. Now this witness did not say whether or not he had seen the appellant unlocking the drawer before collecting the papers or locking the drawer before leaving the table after collecting the papers. The learned magistrate merely accepted the story that P.W.1 had seen the appellant collecting the papers from the drawer and then leaving the spot after switching off the lights. On the face of this evidence, the presumption should have been that the drawers were unlocked. Yet P.W.1 said that after he had gained access in the premises he had to force open the drawers to get the other two exhibits, P2 and P3.

In my view, on P.W.1's story, the following reasoning should follow: If P.W.1 had seen the appellant collecting the papers from the drawer then the drawer was unlocked and his story that he had forced open the drawers was not true. If, however, it was true that he had to force open the drawers then his story that he had seen the appellant collecting the papers could not have been true, as the appellant was the only person who could have locked the drawer. The learned magistrate could only accept one part of the story but not both parts. He was wrong in having accepted both.

Even if the story that P.W.1 had forced open the drawers could be accepted, the learned magistrate should have further considered his veracity in the light of subsequent events as related by him. Now P.W.1 said that he tested the two keys found among a bunch of keys recovered from the appellant and he said that they fitted the drawers. It is not clear what P.W.1 exactly meant by saying this. As far as I know any key may fit a drawer but the question is will it unlock the drawer? The learned magistrate apparently assumed that by this he meant working the locks. P.W.1 did not say that the two keys worked the locks of the drawers.

Now as regards the drawers, P.W.1 had said that he had forced them. In the normal course of events

if a drawer had been forced, the lock would be damaged. In this particular case two drawers were shown to have been forced. Yet the witness said that two keys "fitted the drawers", (assuming by this he meant that the two keys could work the locks of the drawers). It may be possible for one lock not to be damaged after having been forced but any person would hesitate to believe that two locks were undamaged after having been forced.

These are very material points to the prosecution case, as they are the ones which decided whether the appellant had a case to answer. No doubt the rule is that if a witness had lied on one or two points it does not necessarily follow that his whole evidence should be rejected. (*Khoon Chye Hin* v. *Public Prosecutor*[2]). But it is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted. In this case however the learned magistrate did not do so. He accepted the evidence of P.W.1 wholesale without rejecting the parts which had been shown to be inconsistent with the truth.

Apart from the above, learned counsel for the appellant at the close of the case for the prosecution submitted that, in the circumstances of the case, the table should have been produced. The prosecution officer, much to his credit, did also in effect say that the table was vital to the case and should have been seized. I entirely agree with them. It should have been produced in view of the conflicting testimony of P.W.1 on very material points as regards the table. On this consideration alone since it was not produced, the only inference to be drawn is that if it had been produced it would have been unfavourable to the prosecution.

As far as I can see at the most that can be said of the prosecution case is that it only adduced evidence that the incriminating exhibits were found in the premises. It would be a matter of doubt if P2 and P3 were in fact recovered from the drawers of the table, since in regard to the table it is doubtful if P.W.1 did force the drawers. Since in regard to two keys found on the appellant it is doubtful if they fit the drawers, the presumption should arise that if the drawers had been forced the keys could not have worked the locks. (Indeed it was established in the defence that they were actually for locks in a cupboard in the appellant's house).

The prosecution adduced no evidence to show the relationship of the appellant with the business of the premises as required by the very principles in the case cited by the learned magistrate. The case for the prosecution as it stood in view of the conflicting testimony of P.W.1 was no better than that against the acquitted man.

I would therefore allow the appeal. Conviction and sentence quashed. The fine, if paid, is to be refunded.

Appeal allowed. Conviction and sentence quashed.

Solicitors: *R. Ramason.*

VELUPILLAI v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Chang Min Tat J.) February 19, 1970]

[Ipoh — Civil Suit No. 67 of 1967]

Negligence — Nurse drinking eserine under mistaken idea that it was drinking water and dying from effects thereof — Poison left with bottles of water in refrigerator at hospital — Bottle properly labelled — Negligence of deceased — No negligence on part of hospital authorities in treatment.

Master and Servant — Trained employee — Experience and proficiency — Risk of accident — Carelessness of employee.

The deceased had been a staff nurse and had drunk from a bottle of white liquid under the mistaken idea that it contained drinking water. The liquid was in fact eserine and from the effect of drinking it she died. It appeared in evidence that poisons and drinking water were left in the refrigerator in the hospital but that the bottle containing the eserine was properly labelled. It was also contended that the hospital authorities had been negligent in treating the deceased in not immediately administering gastric lavage.

Held: (1) in this case the cause of the accident was due entirely to the deceased drinking the contents of the bottle containing eserine without ascertaining as she should have done, the nature of the contents by taking the elementary and simple precaution of reading the labels thereon;

(2) in the circumstances of the case the plaintiff had not discharged the onus of establishing negligence on the part of the hospital authorities or any of its servants through any delay occasioned by not administering the gastric lavage in the casualty room.

Cases referred to:-

(1) *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.* [1954] 2 Lloyds Rep. 507; on appeal [1956] 1 W.L.R. 177, H.L.

(2) *Norris* v. *W. Moss & Sons Ltd.* [1954] 1 W.L.R. 346.

CIVIL SUIT.

Dato' S. P. Seenivasagam (*A. Mahendran* with him) for the plaintiff.

Ajaib Singh (Senior Federal Counsel) for the defendants.

Cur. Adv. Vult.

Chang Min Tat J.: A staff nurse of some 14 years' standing drank from a bottle of white liquid under the mistaken idea that it contained drinking water. The liquid was in fact a 1% solution of eserine. From the effects of the eserine she died, and her father as administrator of her estate now sues the Government of Malaysia and Dr. F. X. Fernandez, her departmental head, for damages for negligence.

At the time of her death she was in receipt of a monthly emolument of $465. She was then about 35 years old. She was not married and her father said she had no intention of getting married, her ambition being to rise in her chosen profession to the dizzy heights of a nursing sister. He averred that she used to give him about $300 to $310 a month and that this sum was sent to one of his sons in England, then reading law. This sum was apparently not sufficient as, according to the plaintiff, he had to supplement it. He did not retain any of it for himself. At the hearing, this law student was sitting for his Bar Finals. Since the death of his daughter the plaintiff had to depend upon his other children for help, and in the context of